gives an implied right to the mortgagee to sell after giving reasonable notice. As our Contracts Act, 1950, is similar to the Indian Contracts Act the position here would therefore be similar to that in India where shares are goods and therefore pledgeable. As in India there can be a pledge of shares and there can also be a mortgage of shares; whether it is one or the other will depend on the intention of the parties and the circumstances of each case. (See Das J. in *Arjun Prasad* v. *Central Bank of India*[6]). For purposes of a sale of the shares the distinction between a mortgage and a pledge would not be material as in either case reasonable notice would have to be given. The important point, however, to note was that there was no sale of the shares in question whereby notice to the plaintiff and her representees would have been necessary. I agreed with counsel for both applicants/defendants that when the share certificates of the plaintiff and her representees were deposited with the first defendant bank to secure a debt or loan to the various third parties, and which in this case were accompanied by transfers in blank as to the name of the transferees, a mortgage of those shares was created. The intention was that the first defendant bank as mortgagee should be at liberty later on to fill up the blanks and perfect its security by getting itself registered. In this case the first defendant had not only an implied as well as an express power to sell those shares after reasonable notice which it did not exercise (*Stubbs* v. *Slater; Deverges* v. *Sandeman, Clark & Company*[7]), but it also had both an implied as well as an express right to fill up the blanks in the transfer forms and to register those shares into its name or the name of its nominee company in the event of a default by the borrowers which was what had happened in this case. Alternatively the first defendant bank also had a mortgage's usual right to foreclose (*Harrold* v. *Plenty*[8]). Therefore the answer to the question posed by counsel for the plaintiff was that the first defendant bank was in the circumstances of this case legally entitled to register the shares of the plaintiff and those of her representees into the name of its nominee company.

Finally after Pernas Chartered Management Sdn. Bhd., the second defendant in this action, have registered the 1,263,500 shares into the name of Perwira Habib Nominees Sdn. Bhd. on June 28, 1985, (see exhibit AT 18 to enclosure 7) the plaintiff and her representees were then no longer members of KTD. As such they did not have the right under section 148 of the Companies Act, 1965, to attend any general meeting of the company and to speak and vote on any resolution nor were they entitled under section 149 of the said Act to appoint another person or persons as their proxies to attend and vote instead of them at any meeting of KTD. Therefore even if there were triable issues in this case the plaintiff was not, in my judgment, on the balance of convenience in the light of the evidence available to court on July 5, 1985, entitled to the various injunctions including the mandatory injunction ordering the first defendant to execute fresh proxy forms in respect of the said 1,263,500 shares which were originally in her name and those whom she represented. Having considered the above matters I therefore set aside the order granted by me to the plaintiff on July 1, 1985.

Counsel for the plaintiff then applied for a stay of execution until the disposal of a proposed appeal and relied on the authority of *Erinford Properties Ltd.* v. *Cheshire County Council.*[9] I refused that application for stay and counsel immediately applied for a fresh injunction which I also refused to grant.

Order accordingly.

Solicitors: *Sri Ram, Zulkifli & Kumar; Suhaimi Khor Zulkifli & Chang; Skrine & Co.; Zain & Co.*

OVERSEAS UNION BANK LIMITED v. LEE GUAT CHEOW & CO. SDN. BHD.

[O.C.J. (Mohamed Dzaiddin J.) September 2 & October 29, 1985]

[Penang – Originating Summons No. 140 of 1984]

Land Law – Loan secured by property – Foreclosure action – Order of sale – Whether plaintiff guilty of unreasonable or unconscionable conduct – National Land Code 1965, ss. 256(3), 257(1)(c), 265(2) – R.H.C. 1980, O.56 r.2(2) – Moneylenders Ordinance 1951.

In this foreclosure action, the plaintiff applied for order of sale of two properties in Georgetown, Penang ("the said property") to be sold by a public auction under the provisions of the National Land Code 1965. The said property belonged to the defendant, a family company incorporated in Malaysia. On August 5, 1983 the defendant consented to and executed a third party legal charge of the said property in favour of the plaintiff to secure overdraft facilities of $300,000 given to or for the benefit of Myli Enterprise Sdn. Bhd, a company incorporated in Malaysia and having its registered office in Penang. Myli Enterprise Sdn. Bhd. defaulted in paying the overdraft sum. On July

12, 1984 the plaintiff sent a statutory notice of demand to the defendant demanding payment of the outstanding overdraft sum amounting to $356,242.94 with interest to be paid within one month from the service of the demand letter. The defendant failed to honour the notice of demand, and thereupon the plaintiff commenced foreclosure action against the defendant under section 256(2) of the National Land Code 1965.

Held: in applying the principle stated in the *Kheng Soon Finance* case[3] to the facts and circumstances in the present case, the plaintiff-chargee is not guilty of any unreasonable or unconscionable conduct. In fact the defendant had failed to show any existence of cause to the contrary under section 256(3) of the National Land Code.

[*Editorial Note:* In the appeal against the judgment of Mohamed Dzaiddin J., the Supreme Court (Mohamed Azmi, Abdoolcader and Wan Hamzah, S.C.JJ.) in Supreme Court Civil Appeal No. 282 of 1985 on November 26, 1985, upheld the decision of the High Court.]

Cases referred to:

(1) *Murugappa Chettiar* v. *Letchumanan Chettiar* [1939] M.L.J. 296.
(2) *Public Finance Bhd.* v. *Narayanasamy* [1971] 2 M.L.J. 32.
(3) *Kheng Soon Finance Bhd.* v. *M.K. Retnam Holdings Sdn. Bhd. & Ors.* [1983] 2 M.L.J. 384.

ORIGINATING SUMMONS.

Lim Cheng Poh for the plaintiff.

Pamela Ong Siew Im (*Miss*) for the defendant.

Cur. Adv. Vult.

Mohamed Dzaiddin J.: In this foreclosure action, the plaintiff applied for order of sale of two properties held under Grant (1st Grade) Nos. 7139 and 7140 for lot Nos. 59 and 943 respectively under section 13, Town of Georgetown, North East District Penang ("the said property") to be sold by a public auction under the provisions of the National Land Code 1965.

The said property belonged to the defendant, a family company incorporated in Malaysia which trades in rubber and oil palm. On August 5, 1983 the defendant consented to and executed a third party legal charge of the said property in favour of the plaintiff to secure overdraft facilities of $300,000 given to or for the benefit of Myli Enterprise Sdn. Bhd., a company incorporated in Malaysia and having its registered office at 1st Floor, 636A Penang Street, Penang.

It was clear that after sometime Myli Enterprise Sdn. Bhd. defaulted in paying the overdraft sum. Then on July 12, 1984 the plaintiff sent a statutory notice of demand in Form 16D to the defendant demanding payment of the outstanding overdraft sum amounting to $356,242.94 with interest to be paid within one month from the service of the demand letter. Unfortunately, the defendant had failed to honour the notice of demand and to pay the sum demanded. Hence, the plaintiff commenced foreclosure action against the defendant under section 256(2) of the National Land Code 1965.

This application was heard by me on January 28, 1985 and was supported by an affidavit of Mr. Gan Kwong Fah (encl. 2). After hearing the parties and at the request of counsel for the defendant, I adjourned the matter to May 6, 1985 to enable them to arrange the terms of settlement. The matter came up again on June 17, 1985 when I granted the plaintiff's application for order of sale. The amount due to the plaintiff as at that date under section 257(1)(c) was $442,866.35. The defendant being dissatisfied with my order in terms of the plaintiff's application applied for further argument in open court under Order 56 Rule 2(2) of the Rules of the High Court 1980. On September 2, 1985, after hearing further argument I made my finding that there was no merit in the defendant's argument to satisfy me of the existence of "cause to the contrary" under section 256(3) of the National Land Code.

It is clear under section 256(3) the onus is on the chargor *i.e.* the defendant to show the existence of cause to the contrary. Normally this can be shown by way of defence that the registered charge is not valid *e.g.* non-compliance with the statutory provisions of the National Land Code or the loan was a money-lending transaction and not enforceable due to irregularities under the Moneylenders Ordinance, 1951. However, this was not the case here. What Miss Pamela Ong, counsel for the defendant, had raised as issues for "existence of cause to the contrary" was merely to show that for reasons as explained by the defendant in the affidavit of Low Ai Lean, a director of the defendant (encl. 12) it was inequitable to grant the order of sale.

Briefly, the defendant has been a long-standing customer of the plaintiff bank. Sometime in September 1961 the plaintiff granted a loan of $100,000 to the defendant secured by a first legal charge from the defendant's property. In 1983 when the defendant defaulted in the repayment of the said loan and interest the plaintiff took foreclosure action under Originating Summons 17 of

1983 for an order of sale of the charged property. It appeared that the total amount owing was about $150,000. In addition, there was another sum of $60,000 owed by the defendant associate companies to the plaintiff. Both the defendant and the associate companies could not raise the money to settle the loan. Quite understandably, being an old customer of the plaintiff, the plaintiff agreed to withdraw the application under Originating Summons 17 of 1983 upon the plaintiff granting a fresh loan of $300,000 to Myli Enterprise Sdn. Bhd. to be secured by the said property belonging to a family friend of the defendant, Low Hean Teik, who is a director of Myli. It was also agreed that the fresh loan of $300,000 would be utilised to settle in full the debt due and owing by the defendant and its associate companies which at that point of time had already amounted to about $210,000. The balance of $90,000 was to be paid into a new account of the defendant with the plaintiff which would be utilised to service the interest of the principal sum of $210,000. After everything was agreed, the solicitors of the bank moved in, so to speak, to prepare the necessary documentations to give legal effect to the said arrangement, which included resolutions passed by the defendant company and Myli Enterprise Sdn. Bhd., relating to opening of account with the plaintiff. However, the unfortunate feature of the whole episode came to the open when it was realised that one of the directors of Myli Enterprise Sdn. Bhd. had absconded with a sum of money amounting to $90,000 which he had withdrawn from Myli's account with the plaintiff. The company ceased business and attempts were made to trace the culprit. Interest on the overdraft began to accumulate which by December 26, 1983 amounted to $356,242.94.

Counsel for the defendant had persuaded this Court not to grant the plaintiff's application because she blamed the bank for permitting the withdrawal of moneys by Low Hean Teik from Myli Enterprise's account contrary to the resolution of the defendant. She alleged that the plaintiff's conduct was wrongful, and submitted that the bank was guilty of unconscionable conduct. She referred to the cases of *Murugappa Chettiar* v. *Letchumanan Chettiar*[1]; *Public Finance Bhd.* v. *Narayanasamy*[2]; and *Kheng Soon Finance Bhd.* v. *M.K. Retnam Holdings Sdn. Bhd. & Ors.*[3] In all these cases, the facts are dissimilar with the present case. However, in the *Kheng Soon Finance* case it was held, *inter alia*, on an application for sale of the land charged the Court has not only to apply the law but also to invoke the aid of equity in order to satisfy whether a cause to the contrary has been shown or not in accordance with section 256(3) of the National Land Code. The chargee must not only come to Court with proof that the chargor has defaulted but also with proof that the chargee himself is free of fault and that he was not guilty of any unreasonable conduct, and that there was no right of innocent third parties to be affected by the Order.

Thus, in applying the principle stated above to the facts and circumstances in the present case, I am satisfied that the chargee is not guilty of any unreasonable or unconscionable conduct. In fact I find the defendant has failed to show any existence of cause to the contrary under section 256(3) of the National Land Code. Clearly, what the plaintiff had done before the order of sale was to accede to the defendant's request to delay the application to enable the defendant to find a suitable purchaser for the said property so that they can get the money to redeem the charge created against the plaintiff. This I think the defendant had failed to do and it was then open to them to raise the issues with a view to delay the sale.

For the above reasons, I find there was no merit in the defendant's objection. I confirmed my order given on June 17, 1985 granting the plaintiff an order of sale of the said property.

Application allowed.

Solicitors: *Lim Cheng Poh & Lim; Lim Kean Siew & Co.*

CHIEW SWEE CHAI v. BRITISH AMERICAN INSURANCE CO. (M) SDN. BHD.

[O.C.J. (Shankar J.) December 22, 1985]

[Muar – Originating Summons No. 229 of 1983]

Insurance Law – Life policy – Basic accidental dismemberment of limb benefit – Complete loss of function of insured's left arm – Refusal to amputate – Whether "loss" as defined in policy.

The plaintiff, the insured, took out a life policy with the defendants, the insurers, effective from July 14, 1980. The policy provided, *inter alia*, that if the insured should, by accidental means, sustain the loss of one limb, the insurers would pay the insured one half the amount of